Supreme Court, U. S.
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No. 97-124

In The

Supreme Court of the United States

October Term, 1996

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully petitions this Court to deny petitioner's writ of certiorari to review a final order of the Supreme Court of Appeals of West Virginia.

STATEMENT

Your respondent, John Kessel, takes exception to the statement of facts outlined by the petitioner. The petitioner designed the very dilemma of which he complains. As is set out more fully below, petitioner made no effort to provide any security for the judgment, made conflicting representations to the West Virginia trial court about his ability to post bond, refused to provide the West Virginia court with any evidence of his assets or subject himself to examination for discovery of the same, never requested from the West Virginia court a reduction in bond, resisted enforcement action in California and refused to post a $2 million bond required in California, while at the same time transferring his California assets to others to avoid subjection of the assets to the judgment. While appealing the judgment to the West Virginia Supreme Court, he obtained a California trial court ruling vacating the West Virginia judgment and dismissing respondent's fraudulent transfer action. When the West Virginia Court dismissed petitioner's appeal pursuant to West Virginia's statutes and rules, respondent had no security for the judgment being appealed while petitioner had been given four opportunities to provide an alternative to the dismissal of his appeal. His only response was

to claim the West Virginia Supreme Court lacked the authority to require bond as a condition of an appeal. Obviously, the petitioner adopted a legal strategy of never posting bond of any kind or any amount in West Virginia while attempting to insulate his assets from judgment.

I. The Underlying Action

Contrary to the facts as stated by the petitioner, this case did not arise simply from an arranged adoption, but from deliberate acts calculated to deprive John Kessel of his son. This conduct included directing an Oregon lawyer not to give John Kessel any notice of proceedings, PX 10, 222, directing a West Virginia lawyer that they must prevent John Kessel from learning of the whereabouts of the child or the adoption until the time for him to assert his rights expired, R. 57, 430, intentionally ignoring a West Virginia injunction preventing placement of the child, PX 17, 241, 430, sending a false affidavit to Canada to enable the adoption to proceed to termination of John Kessel's rights, PX 39, 334; 343, 358, and giving false testimony in a deposition denying knowledge of the whereabouts of the adoption proceedings and child when he knew where it was. Tr. 47, 2254-2256. David Leavitt was intimately working with two West Virginia lawyers with respect to this plan, which included frustrating the West Virginia court proceeding. Tr. 521, 397-398, 400, 247, 210-212, R. 1071, PX 7. The allegations in the complaint included a conspiracy among David Leavitt and the other

defendants which included Brian Conaty, one of the lawyers.[1] One thing is clear from the record of this case, John Kessel did everything legally possible to come forward and assert his rights to his son. Defendants did everything they could to prevent him from doing that. David Leavitt stated in letters to Brian Conaty, "I think it is important that they (John Kessel and his attorneys) be prevented from learning any more than they know already for another month if at all possible." Tr. 4310, PX 57. Defendants' conspiracy was successful and prevented John Kessel from finding out until it was too late. Tr. 370-371, 469-470.

Over a seven year period, John Kessel and Anne Conaty were engaged to be married twice. In 1990, out of this relationship which spanned John Kessel's medical school and residency, a son was conceived in Cabell County, West Virginia. In a preconceived and premeditated plan and scheme, the petitioner David Leavitt sent John Kessel's son to Alberta, Canada to prevent him from exercising his constitutional rights as an unwed father to at least notice and a hearing in a United States court before termination of all of his rights to his son. John Kessel's son is now seven years old and he has never seen or spoken to him.

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[1] Much of the complained of conduct is documented in plaintiff's exhibits which included David Leavitt's file. In that file was evidence of phone conversations and written communication between David Leavitt, Brian Conaty and David Lockwood, Anne Conaty's West Virginia lawyer. The shear volume prevents recitation of all of these facts herein.

In January, 1991, Anne suddenly left town. Petitioner contends that Anne left before contacting David Leavitt. The circumstantial evidence, however, points to the contact occurring before she left West Virginia. Tr. 2041-2042. David Leavitt's case file for Anne Conaty included telephone charges which date back to February and March, 1991, and one which appears to date back to January of that year. Tr. 911, PX 4. David Leavitt admitted the first contact was in March, 1991. Tr. 190-191. This contradicted testimony of the Conaty defendants who claimed that the call came from North Carolina in April. Tr. 1870, 2043-2044. Mr. Leavitt counseled clients to follow this kind of procedure in avoiding birth fathers' attempts to come forward and assert their rights. As he told Mr. Schafferius, "move her around to get to the point where they will have a hell of a time catching up with her," as well as other cloak and daggerish conduct to avoid being served with court orders and such. Tr. 1541-1575, 1986, R. 2986, PX 92. As Mr. Leavitt told one witness, he knew how to get around the law. Tr. 687.

Mr. Leavitt advertises all over the United States, Canada and other countries for adoption and placement of babies. He also was advertising in the West Virginia Bell Atlantic Yellow Pages in 1991 as both an attorney and adoption law center. Tr. 177-178, R. 908, PX 2. His normal practice was to require the adoptive couple to deposit money in his trust account to complete the adoption. In this case, it was over $18,000.00. Tr. 182, 199-200, R. 910, PX 4. Although he advertised in West Virginia, he claimed to have no knowledge of West Virginia law. Tr. 194. And, although he essentially places children through his office, he has no one in his office trained to place

children. Tr. 153-154, 160-163. He received 24 calls from West Virginia on his 800 number in just a few months in 1991. R. 154.

After Anne Conaty left town in January, 1991, she never returned until October, 1991, three months after the baby was born. She did, however, retain her residence in Huntington, West Virginia, and merely took leave of absence from her work. Tr. 195, PX 5. Soon after she left town, John Kessel hired attorneys to intervene on his behalf to assert his legal rights to his son. By May 1, 1991, Cheryl Eifert, John Kessel's lawyer, had already written to Anne's West Virginia lawyer, David Lockwood, asking about the baby's prenatal care and warning that he would take legal action, if necessary, to assert his rights to the child. Tr. 288, PX 8. This was faxed to David Leavitt by defendant, Brian Conaty, on May 21, 1991. Brian Conaty, a West Virginia lawyer, had agreed on behalf of petitioner to keep a close check on the courthouse for lawsuits. Tr. 212, PX 8.

Plaintiff, having no response to his attorney's letters, filed suit on June 3, 1991, asking for his paternity rights. On June 21, 1991, David Lockwood, Anne's West Virginia lawyer, faxed a copy of the summons and petition for his rights to David Leavitt. Tr. 241, PX 16. On June 26, 1991, the Circuit Court of Cabell County issued an injunction prohibiting the adoption placement until after John Kessel's paternity could be established. Tr. 241, 750, PX 17, 80A. This injunction was served by publication before the baby was released to the adoptive couple, and it was served on Anne's brother, Brian Conaty, at Anne's place of residence on June 28, 1991. Tr. 732, PX 73, Tr. 1232, PX 66, 67, R. 1210-1236, Tr. 662, 673-674. The jury found by

special interrogatory that both Anne Conaty and David Leavitt had actual notice of the injunction before the baby was placed for adoption. (Petitioner's Appendix A).

Although petitioner claims that all he did in California was lawful, he personally selected the adoptive couple from Canada. Petitioner admitted that in a private placement the parent placing the child must personally select the adoptive parents according to California law. Tr. 174, 662, 2258. He also admitted that it would be unethical for him to cover up the names and information about the adoptive couple and not tell the natural mother information about the adoptive couple. Tr. 2266. Yet, that is what he did. Tr. 1587-1589. Petitioner also advised an Oregon lawyer not to notify John Kessel of a proposed Oregon adoption. Tr. 222. Consequently, the Oregon adoption was cancelled. Tr. 223-224. He then phoned Canada on a weekend and arranged the adoption with the Canadian couple without a home study for the couple who was going to adopt this baby. Tr. 278, 297-299. Petitioner knew of the lawsuit, and without ever asking a West Virginia lawyer whether service was effective, he advised Anne Conaty to not pay any attention to it. Tr. 391. With all of the knowledge of John Kessel's letters, the court action in West Virginia, the injunction and the rights of a determined father, petitioner forwarded all of the information to Canada and asked that the adoption be expedited. PX 52, 473.

The nexus of petitioner's plan was to transport the baby into a jurisdiction which did not recognize the father's rights. Alberta was ideal because if the baby was in the adoptive couple's home for six months, it was impossible to remove it, even if the father found it and

intervened. Tr. 370-371, 469-470. It was this six month "statute of limitations" which became critical in petitioner's conspiracy. The defendants then set about to frustrate and obstruct any attempt by John Kessel to find out where the adoption proceeding was. Petitioner was so desperate to keep John Kessel from discovering this that he testified in November in his deposition that he did not know whether a baby was born or if adoption proceedings had been initiated. Tr. 470, Dep. 13-14. A month earlier he had written the Canadian lawyer and instructed him "you may wish to finalize the adoption expeditiously!" Tr. 473, PX 52. He wrote to Brian Conaty and instructed Brian, Anne's brother, to prevent John Kessel from learning of the adoption or the baby. Tr. 430, PX 57. After a West Virginia trial judge ordered authorization to produce petitioner's file, he sent it out of the country. Tr. 501, PX 64. Brian Conaty, one of the petitioner's co-conspirators, also testified in a West Virginia court proceeding that he had no knowledge of the birth. Tr. 750, PX 80-B. Six days earlier he had received a fax from petitioner discussing the birth of the baby. Tr. 1192-1196. Throughout all of this, the West Virginia trial court admonished attorneys representing the other defendants that obstruction of justice was a serious offense and that the father had constitutional rights and that John Kessel's rights in West Virginia had been established. R. 2012, PX 97, p. 32; R. 2016, PX 98, p. 10; R. 2014, PX 98 p. 32; R. 2020, PX 101, pp. 9-12. In the meantime petitioner gave legal advice with respect to the West Virginia civil action. PX 45, 363. The West Virginia trial court found other Conaty defendants in contempt of court for failure to give evidence. PX 7, 210; PX 73, 732; PX 78, 732.

Petitioner claims his only contact with West Virginia was a Bell Atlantic yellow page advertisement. But that is not accurate. He engaged in a conspiracy with West Virginia residents to deprive a West Virginia resident of his parental rights. He communicated regularly with the West Virginia co-conspirators and others by phone and facsimile. PX 4-10, 15-16, 19, 23, 38, 41-46, 51-64, 89-90, 103; Tr. 182-241, 272, 280-292, 334, 409-410, 430, 1252, 2325; R. 1071.

II. Post-Judgment Proceedings Regarding The Judgment, Bond, and Petitioner's Appeal

Contrary to petitioner's argument, all of the defendants – including petitioner – sought a stay of the judgment pending ruling of the post-trial motions and/or the defendants' anticipated appeal. Res. App. 1. Respondent moved for the trial court to impose a bond securing the judgment pending ruling on the post-trial motions pending appeal.

On December 22, 1995, the court held a hearing on respondent's motion for bond. At that hearing, the parties discussed alternatives to the defendants posting a bond as security. The Conatys offered to retain all of their assets pending appeal, provide a verified listing of their assets, submit to depositions regarding the nature of their assets, and pledge the assets to satisfy the judgment pending appeal. Pet. App. 10a. The court accepted this proposal in lieu of requiring the posting of a bond.

With respect to respondent, however, all the parties recognized that his situation was different than the Conatys:

> THE COURT: I would think so. Now, let's talk about Mr. Leavitt. I do see Mr. Leavitt in a different category because he has no financial ties directly here to West Virginia.
>
> MR. STOLZE: Well, obviously Mr. Leavitt is in a special category. On the other hand, though, Mr. Leavitt will not be able to post bond in order to provide security in this state worth seven million dollars. That's a lot of money for any individual to come up with. *We would not object to a two million dollar – to providing security in the amount of two million dollars plus interest.*

Res. App. 2 (emphasis added). Respondent did not offer to submit to discovery regarding his assets, did not offer to retain and not dispose or transfer the assets, and did not offer to pledge the assets to the judgment should it be affirmed. Petitioner did not produce any evidence regarding his assets or ability to post bond.[2] In fact, at the December 27, 1995 hearing on the post-trial motions, petitioner's counsel attempted to partially retreat from his previous statement regarding petitioner's willingness and ability to post bond:

> MR. MASTERS: . . . One of the things that is somewhat confusing to me is the last hearing George said that, as I understood what he said, was that they were willing to post a $2,000,000 bond, that's my memory from Mr. Leavitt.

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[2] Petitioner's refusal to produce evidence regarding his assets did not begin at the post-trial stage. Despite a pre-trial court order requiring petitioner to disclose his assets to respondent for use in respondent's punitive damage case, petitioner refused to submit to any discovery regarding his assets.

> MR. STOLZE: No, I asked that bond be set in that matter. I said didn't say he was willing to post it or that he could post it.

Res. App. at 3. Consequently, faced with no evidence of petitioner's assets and no offer of any alternative to posting bond, the trial court entered an order *granting petitioner's motion for stay* conditioned on his posting a seven million-dollar bond. Pet. App. 12a.

Petitioner neither posted the bond, moved for reconsideration of it, nor filed any information (verified or not) regarding his assets. Faced with *no* protection of his judgment, respondent retained counsel in California and Virginia and began proceedings to secure the judgment pending the appeal.

Respondent first filed his judgment against petitioner in the counties in California where petitioner's assets were located. Petitioner then sought vacation of the judgment on personal jurisdiction and/or a *stay of the judgment pending resolution of the West Virginia appeal.* The original trial court judge assigned to the case in California granted the motion for a stay conditioned on petitioners' posting of a two million-dollar bond. Res. App. 4. Following the entry of that order petitioner submitted an affidavit regarding his assets; however, respondent's attempts to get petitioner to submit to discovery regarding his assets were successfully thwarted.

Petitioner did not post the bond. Consequently, respondent began the process of investigating and securing petitioner's assets. In the course of that investigation,

respondent discovered that petitioner had begun the process of transferring his assets out of his name. Respondent then initiated an action in California seeking to overturn the fraudulent transfers. Res. App. 5. Subsequently, petitioner filed an affidavit from a close friend of the trial court judge, and she recused herself from the case. The successor judge, over respondent's objections, reversed the previous judge's ruling and vacated respondent's California judgment. The court also dismissed respondent's fraudulent transfer action. Respondent's appeals of the California rulings remain pending.

Faced with the California court's refusal to provide respondent with any protection for his judgment pending the West Virginia appeal, respondent filed a motion in West Virginia and returned to the West Virginia courts for relief. Following the filing of all of the briefs on the merits, respondent filed a motion to have the Supreme Court of Appeals require the petitioner to post bond in the amount of seven-million dollars or dismiss petitioner's appeal. In response, petitioner questioned the authority of the Supreme Court of Appeals to impose such a requirement. However, prior to the Supreme Court's ruling requiring bond, at no time did petitioner argue that a bond would violate his rights under the United States Constitution. Furthermore, prior to the Supreme Court's ruling requiring bond, other than the conclusory allegation of counsel that petitioner was unable to post a seven million-dollar bond, neither did petitioner provide the West Virginia court with any information regarding the petitioner's assets. On January 16, 1997, the Court granted respondent's motion and entered an order requiring respondent to post the seven-million

dollar bond by January 26, 1997 or face dismissal of his appeal. Pet. App. 15a-16a.

On January 21, 1997, petitioner then filed an "emergency" motion to reconsider the bond order. The motion sought either reconsideration or a stay of the ruling to allow petitioner to present oral argument on both the bond ruling and the merits of the appeal at the oral argument scheduled for January 28, 1997. Respondent then filed a response to the motion and petitioner filed a reply on January 22, 1997. In neither opposition did petitioner provide any documentation or information regarding his assets or ability to post bond. On January 24, 1997, the Court granted the motion to stay the bond order and set the issue of reconsideration for hearing with the hearing on the merits of the appeal scheduled for January 28, 1997. Pet. App. 20a. Oral argument on the merits of the appeal by all parties – including petitioner – occurred as scheduled along with argument on the motion to reconsider bond.

In both his response to the motion to reconsider and at the oral argument on the issue, respondent emphasized that petitioner had presented no evidence of his financial ability or offered alternatives that would allow respondent to establish his ability to post a lesser bond. Notwithstanding these contentions at no time prior to the court's ruling did petitioner present any evidence of his ability to post bond. Instead, petitioner continued in his attempt to convince the court that it did not have the power to order any bond at all.

On February 6, 1997, the court entered an order granting, in part, petitioner's motion regarding bond. Pet.

App. 20a. In the order, the court reduced the required bond to $1,100,000.00, an amount approximating petitioner's share of the joint and severally ordered compensatory verdict. *Id.* Following the entry of the February 6, 1997, order, petitioner again moved for reconsideration. In that motion, petitioner noted that he "appreciate[d]" the order reducing the amount of the bond, but admitted that *his argument had not been "that the amount of the 'appeal bond' was too high, but that [the court] has no authority to require such an 'appeal bond.' "* Notwithstanding this contention, *petitioner,* for the first time presented to a West Virginia court his purported "evidence" of his ability to post the bond by filing a copy of the conclusory declaration he filed in California following the order requiring him to post the two-million dollar bond.[3]

On February 19, 1997, the court denied petitioner's motion for reconsideration. Pet. App. 21a. Petitioner did not post the bond *or any other security.* On March 11, 1997, respondent filed a motion to dismiss petitioners' appeal that concluded:

> Therefore, the defendant having made no offer of security whatsoever, and having posted no bond whatsoever, plaintiff respectfully

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[3] Respondent vigorously contests petitioner's self-serving, unsubstantiated declaration of the value of his assets which include a residence on Rodeo Drive in Beverly Hills, California and other commercial property in Beverly Hills and Los Angeles, California. However, based on these documents, by his own admission, petitioner had the ability to post a bond in the range of $550,000 to $650,000. Notably, he never offered in West Virginia to post even a fraction of this amount or any of the underlying assets.

> moves this Honorable Court to dismiss the appeal of David Keene Leavitt for failure to comply with this Court's order dated February 6, 1997.

Res. App. 7. Petitioner did not respond to this motion. On March 20, 1997, the court granted the motion and dismissed petitioner's appeal. The appeal of the Conaty defendants remains pending with a decision expected after September 1997.

REASONS FOR DENYING THE PETITION

I. This Court's Established Precedent Supports The Constitutional Authority Of A State Court To Require Petitioner To Post Reasonable Security In Order To Prosecute His Appeal

The Courts of West Virginia granted Mr. Leavitt a multi-week jury trial, post-trial review of the awards and numerous opportunities to comply with the rules and orders of the West Virginia appellate system.[4] The dismissal of his appeal following his refusal to comply with the court's orders raises no issue worthy of review by this Court.

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[4] Petitioner's suggestion that the Supreme Court of Appeals had no authority to impose the appeal bond on him should be summarily rejected by this Court. As the highest court in the West Virginia judicial system, its decisions regarding West Virginia law and its own appellate procedure are not subject to review in this Court. Petitioner's argument that the Court did not have the authority to require the bond was rejected three times by the court below.

A. The West Virginia Court's Order Requiring The Petitioner To Post An Appeal Bond Did Not Violate His Right To Due Process And Equal Protection

This Court recognized long ago that due process permits a Court to condition access to the appellate process upon the posting of assets adequate to secure the judgment on appeal:

> Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration.
>
> * * *
>
> Viewing the dismissal of petitioner's appeal in the light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing a supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

National Union v. Arnold, 348 U.S. 37, 44-45 (1954). Applying this holding, the *National Union* Court affirmed the dismissal of an appeal by the Washington Supreme Court when the judgment debtor refused to comply with the court's order requiring it to transfer its only assets from California to a Washington receiver. *Id.* Contrary to petitioner's argument, *National Union* is not distinguishable. Like the plaintiff in *National Union*, respondent attempted unsuccessfully to secure the defendant's property in California pending appeal. Following the California courts' refusal to grant them relief both returned to the appellate

court reviewing the judgment for relief. While the relief sought and obtained may differ in kind, both received an order requiring the judgment debtor to secure the judgment as a condition for prosecuting the appeal. Any differences in the manner of effectuating the relief have no constitutional significance.[5]

The validity of *National Union* has withstood the test of time. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court found unconstitutional an Oregon appellate bond requirement that a tenant appealing an adverse ruling post a bond in the amount of double the accrued rent with the entire bond being automatically forfeited should the judgment be affirmed.[6] *Lindsey*, however, made clear that the principles set forth in *National Union v. Arnold* remained good law noting that "a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, [and] to guard a damage award already made . . . " 405 U.S. at 77. Indeed, the *Lindsey* Court explicitly reaffirmed the validity of *National Union*. *See id.* at 78 ("We do not question here reasonable procedural provisions to safeguard litigated property, *cf. National Union* [*supra*]"). Likewise other opinions of this Court recognize the propriety

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[5] Indeed, requiring the posting of a bond or other security is certainly less burdensome than requiring petitioner to transfer the assets to West Virginia.

[6] The flaw with the Oregon statute was that the double-bond requirement was unrelated to actual rent accrued or to specific damage sustained by the landlord and, therefore, was unnecessary to assure the landlord payment of accrued rent. 405 U.S. at 77.

of appellate procedures designed to regulate the appellate process to protect winning litigants against improper actions by losing litigants who attempt to appeal.[7]

In this case, the Supreme Court of Appeals ordered Leavitt to post a bond in an amount of his share of the compensatory verdict. The bond ultimately ordered was only a portion of the judgment against petitioner. Thus, unlike *Lindsey*, the amount of the bond ultimately ordered bears more than a reasonable relationship to respondent's verdict against petitioner, and thus, the bond requirement imposed no penalty on petitioner as a prospective appellant.[8]

Petitioner's argument that the West Virginia bond requirement violates well-established procedural norms is contradicted by the cases he cites. Indeed, even this Court's precedents regarding security requirements establish that other courts have applied similar appellate procedures imposing security or other procedural requirements. The general appeal bond provisions approved in *Lindsey*, along with the procedures approved

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[7] *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (affirming , the Supreme Court affirmed the application of Mississippi's 15% appellate penalty statute imposed on parties who appeal unsuccessfully from money judgments or other categories of judgments whose value may be readily determined).

[8] Even the original order providing for an appeal bond in the amount of the punitive award finds sanction in *Lindsey*. *See* 405 U.S. at 78 (noting that a state has "broad authority" to require appeal bond for judgments providing for double or treble damages "even though posting an appeal bond will be doubly or triply more difficult").

in *National Union* and *Crenshaw* represent examples of "reasonable procedural provisions to safeguard litigated property," pending appeal. *Lindsey, supra.*

Other examples of similar appellate requirements appear in the reported cases.[9] As the court in *Patterson, supra,* noted:

> Legislatures, except where inhibited by Constitutional mandate, have had the power generally to regulate appellate procedure, *including the authority to require the giving of a bond as a condition precedent to the consummation of an appeal.* 4A C.J.S. Appeal & Error 502, p. 208. *In many jurisdictions, statutes have been passed requiring, as a condition precedent to taking or perfecting an appeal, that the appellant, or plaintiff in error, must give a bond, recognizance, or undertaking for payment of the judgment, order or decree.*

371 F. Supp. at 1364-65 (emphasis added). Thus, the security requirement imposed on petitioner does not constitute "a change in ancient procedure . . . which disregards . . . fundamental principles" of due process. *Twining v. New Jersey,* 211 U.S. 78, 101 (1908).

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[9] *See Patterson v. Warner,* 371 F. Supp. 1362 (S.D.W.Va. 1972) (three judge panel approving constitutionality of the bond requirements of former W. Va. Code § 50-15-2 requiring the posting of bond double the amount of the judgment to appeal judgment rendered by Justice of the Peace); *Scott v. Morrison,* 1993 U.S. App. LEXIS 14896 (4th Cir. 1993) (approving constitutionality of Virginia requirement requiring appeal bond for rent which has accrued and may accrue but not to exceed one year's rent).

Indeed, even applying the *Mathews v. Eldridge*, 424 U.S. 319 (1976), test urged by petitioner, the bond requirement does not violate due process. The petitioner's interest in the judgment against him must be balanced against the state's interests in "guard[ing] a damage award already made . . . " *Lindsey, supra.* When the judgment debtor has no assets in the forum state, a requirement of bond or other security is the only way to protect that interest. Moreover, the risk of an erroneous deprivation of petitioner's property is nonexistent as the requirement that security be posted only guarantees that the security posted would be paid should the judgment be affirmed. *National Union*, 348 U.S. at 45.

Finally, this Court's precedents regarding access to the appellate process are not applicable to the facts of this case. Petitioner had access to the appellate process. However, as a condition to that access, he was required to post security.[10] The West Virginia courts' orders described above show the courts' flexibility in balancing the litigants' rights in determining security. As noted above, respondents offered alternatives to the bond that were

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[10] Petitioner's reliance on *BMW of North America v. Gore*, 1997 WL 233910 (U.S. 1997) and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) are misplaced. The *Honda Motor* court struck down a state procedure that forbids punitive damage review by both the trial court and the appellate courts. 512 U.S. at 420-21. In this case, petitioner received a thorough post-judgment review of the punitive damage award by the trial court. As noted below, *infra* pp. 27-28, nothing in *Honda Motor* or in *BMW* requires a court to disregard otherwise constitutional appellate procedures in order to review a punitive damages award.

rejected by petitioner. At all times in West Virginia, petitioner steadfastly refused to agree to any security or even submit to discovery regarding his assets. Given both these facts and this Court's opinions regarding appeal bonds, no violation of petitioner's right of access to the appellate courts has been shown.

B. The West Virginia Court's Order Requiring The Petitioner To Post An Appeal Bond Did Not Violate The Commerce Clause Or The Privileges And Immunities Clause

Petitioner's argument regarding the Commerce Clause and the Privileges and Immunities Clause is entirely based on the incorrect conclusion that he was singled out because he was a nonresident. The facts described above establish that his actions were what resulted in the orders entered against him. Indeed, petitioner continually and consistently rejected the opportunity to provide security to respondent like that provided by the other defendants.

Unlike the other defendants, petitioner steadfastly refused to submit to discovery regarding his assets. While the other defendants submitted to detailed discovery of their assets, petitioner refused both in California and in West Virginia. Indeed, it was only after the entry of the bond orders in those states did petitioner file the unsubstantiated "disclosure." He did not provide respondent with either depositions or the detailed information provided by the Conaty defendants.

Moreover, the Conaty defendants agreed not to dissipate their assets and agreed to have liens placed upon

them pending appeal which provided that the assets would be transferred to respondent should respondent be successful. Petitioner, rather than make such an agreement, fought and continues to fight encumbrances placed on his property by respondent and has transferred assets. The West Virginia Courts concluded that these activities justified greater security than that provided by the Conatys. Had petitioner ever offered to provide the same protection, there would have been no need to seek a bond.

The West Virginia order does not burden commerce, only judgment debtors who refuse to provide security of any sort pending their appeal. Nor does it violate the privileges and immunities clause, as the Constitution provides no privilege to judgment debtors who fraudulently transfer assets and no immunity from state requirements regarding the posting of security pending appeal.

II. Petitioner Had Sufficient Contacts With The Courts Of West Virginia To Support Their Exercise Of Personal Jurisdiction Over Him

Petitioner seeks to continue the strategy he adopted unsuccessfully below. He attempts to present the jurisdictional issue in terms of a single contact – the act of placing a yellow page ad. *In doing so, he continues to ignore the numerous other specific contacts he had with West Virginia in this case.* Respondent never based his claim of jurisdiction over Mr. Leavitt solely on the yellow page ad, even though that would in this circumstance give jurisdiction. The sum of these contacts, all of which were presented to the trial court, led it to conclude that the courts of West

Virginia had personal jurisdiction over petitioner for the injuries he caused to respondent. As will be shown below, this ruling presents no issue worthy of this Court exercising its certiorari jurisdiction.

Petitioner argues that the exercise of personal jurisdiction over him by the West Virginia courts in this case fails to comport with the requirements of the due process clause. In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), this Court set forth the rule that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *See also McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

In this case, petitioner's contacts with West Virginia were much more extensive than the placing of a yellow page ad. The documentary record in this case discloses the numerous contacts Leavitt had with West Virginia in the course of directing the scheme to defraud plaintiffs of their son and grandson. Months prior to the birth of the baby, petitioner's own file establishes that he was aware of who the father was, the fact that the father objected to the proposed adoption, the location of the father, the location of Anne Conaty's lawyer in West Virginia, and the fact that Dr. Kessel was contemplating legal action to stop the adoption. It was also clear to petitioner that Anne Conaty was at all times a West Virginia resident.

Petitioner's contacts with West Virginia became more substantial in the latter part of May, 1991, and until February, 1992, as he directed the actions of the Conaty defendants in West Virginia and supervised the frustration of the West Virginia court's injunction against the adoption of respondent's son. In sum, petitioner directly orchestrated a conspiracy or scheme that successfully resulted in the loss of respondent's child. And, contrary to petitioner's argument, there is substantial evidence that the decision to call Mr. Leavitt resulted from the telephone advertisement. Moreover, even assuming that petitioner's retention occurred as he testified, the documentary record discloses the numerous contacts Leavitt had with West Virginia in the course of directing the scheme to defraud plaintiffs of their son and grandson.

When a defendant purposefully avails himself of the privilege of conducting activities within the forum State, he has clear notice that he is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing his connections with the State. *Woodson*, 444 U.S. at 297.

It is also clear in this case that the relationship between the petitioner and the West Virginia forum was such that it was "reasonable . . . to require [him] to defend the particular suit which is brought there." *International Shoe*, 326 U.S. at 317. As this Court has held, implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating that dispute, *see McGee v.*

International Life Ins. Co., 355 U.S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, *see Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering the fundamental substantive social policies, *see Kulko, supra*, 436 U.S. at 93, 98.

Applying these factors, it is reasonable to require petitioner to defend this suit in West Virginia. First, West Virginia has a great interest in adjudicating this suit. Two West Virginia residents conceived a baby in the state. The mother of the child then fled the jurisdiction in an unsuccessful effort to deprive the father of custody of his child and the State of jurisdiction over her person. The Circuit Court of Cabell County issued an injunction prohibiting Ms. Conaty from placing the baby up for adoption, but the injunction was ignored with the advice and assistance of petitioner. Given defendants' total disregard for the authority of the West Virginia Courts and for the constitutional rights of one of its citizens, West Virginia had a great interest in the adjudication of this matter.[11]

---

[11] With regard to the other factors listed above, it was more convenient for the plaintiffs and for all of the Conaty defendants to have West Virginia, rather than California, adjudicate this matter. Furthermore, because of the interstate nature of this action, without petitioner's presence in a West Virginia court, the Conatys could have put the major blame for the entire situation on Mr. Leavitt. Likewise, a separate suit brought only against Mr. Leavitt in California would have allowed him to place the major blame on the Conaty family.

Finally, this Court's precedent clearly supports the exercise of jurisdiction over petitioner based on petitioner's advertisements. Advertising within a state for business has long been viewed by this Court to provide sufficient minimum contacts for the assertion of personal jurisdiction. In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958), the Court, in looking for minimum contacts between the defendant and the forum state, looked at whether *"the record disclose[d] solicitation of business in that State either in person or by mail." Id.* at 251 (emphasis added). Likewise, in World-Wide Volkswagen, *supra*, this Court again looked to whether the defendants solicited "business [in the forum state] *either through salespersons or through advertising reasonably calculated to reach the State."* 444 U.S. at 289. (emphasis added).

It is undisputed in this case that Leavitt placed an advertisement in the Huntington, West Virginia telephone directory that ran for a year beginning January, 1991. Petitioner's argument that this advertisement had nothing to do with Leavitt's retention by the Conaty defendants is contradicted by the evidence. Anne Conaty testified that she left Huntington in January, 1991 and contacted petitioner as a result of a newspaper advertisement in April. This testimony, however, is contrary to both Leavitt's testimony and his own records. Leavitt testified that his first contact was March 20, 1991. More significantly, Leavitt's file includes telephone charges which date back to February and March and one which appears to date back to January. In addition, Anne Conaty's conduct beginning as early as January, 1991 follows exactly the type of advice that petitioner customarily gave. She left Huntington with all the "cloak and dagger"

style that he recommended, using friends' credit cards, etc. to avoid being traced. Her actions strongly suggest that she was following Leavitt's advice from the very beginning.

The cases cited by petitioner do not support the grant of certiorari in this case. A review of these cases establishes that they all represent application of specific facts to the established law set forth in *International Shoe* and the cases that followed. While some of the cases petitioner cites support the proposition that jurisdiction could be established based solely on an advertisement, petitioner has cited no case where a court has refused to assert jurisdiction with contacts as extensive as these.

III. This Court Need Not Remand For Reconsideration In Light Of BMW

In a continuing attempt to delay the entry of a final judgment against him, petitioner seeks remand of this case for reconsideration in light of *BMW*. Remand is unnecessary as the award of punitive damages does not violate *BMW*. Moreover, petitioner's appeal, including his appeal of the punitive damage award, was dismissed for failure to comply with the bond order. There is nothing about *BMW* that requires a state court to alter the otherwise constitutional procedures that led to the dismissal of petitioner's appeal.

Petitioner, without any citation or other support argues that his conduct was legal in California. Petitioner has not shown that the conspiracy and fraud claims against him would not be recognized in California. Moreover, while a detailed explanation of the state and federal

laws applicable to the adoption is beyond the available page limitations, respondent's brief to the Supreme Court of Appeals of West Virginia details the violations of law.

More importantly, however, unlike *BMW* which was punished for its actions injuring persons in other states, petitioner was punished for his actions that injured respondent, who was a West Virginia resident at the time of his injury. His actions violated West Virginia law even though some of them occurred in California. Much of the conduct was part of the conspiracy directed by petitioner which was intended to and did cause respondent to lose his son. Nothing in *BMW* requires the conduct that causes harm to occur in the state that renders the judgment.

Next, petitioner argues that *BMW* is violated because petitioner had no notice that his conduct violated West Virginia law. Fraud and conspiracy to commit fraud are common law torts that were part of West Virginia law since its inception. Moreover, at trial petitioner himself admitted that placing the baby with knowledge of the injunction was wrong. While petitioner denied knowledge of the injunction, the jury specifically found otherwise. Indeed, the fact that Leavitt directed Anne Conaty to flee to California is a recognition of his knowledge of the position of the West Virginia courts on the issue.

Leavitt claims that he had no notice that such a large punitive damage award could be awarded and that the amount of the award is too high. Given the nature of petitioner's intentional acts and the loss it caused, a punitive award a little over twice the compensatory award should not have been a surprise. Nor under these circumstances is the amount of the award constitutionally

excessive. *See TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443 (approving West Virginia procedure and verdict which led to $10,000,000 punitive award more than 500 times compensatory award) (1993). Given petitioner's continued insistence that he did nothing wrong, one could argue that the punitive damage award was too low.

Finally, petitioner points to nothing about punitive damages that requires a state court to disregard its appellate procedures in order to review a punitive damages award. Petitioner would have this Court create a constitutional right to appellate review of punitive damages awards that does not exist in many other more serious instances. *See Lindsey*, 405 U.S. 77; *National Union*, at 304 at 41-42. Petitioner had the right to have his punitive damage award reviewed on appeal. He did not have the right to have that review while he transferred assets and otherwise frustrated respondent's right to have his judgment secured pending appeal.

CONCLUSION

David Leavitt is no victim. After years profiting by assisting pregnant women in terminating the constitutional rights of fathers to custody of their children, David Leavitt went too far. Convinced that he could trample the rights of what he referred to as "recreational inseminators," he ignored a court order forbidding the adoption of John Kessel's son and, in violation of numerous laws, both state and federal, sent the baby beyond the reach of John Kessel and the United States courts. Faced with a

seven million-dollar judgment against him, he continued to play fast and loose with the judicial system and John Kessel's rights. Indeed, it was not until he was faced with the dismissal of his appeal did he even attempt to disclose what he alleged his assets to be to the West Virginia courts. In the end, he was not willing to pledge even one penny of his assets to give John Kessel security in the event his judgment was affirmed on appeal. Faced with Leavitt's recalcitrant refusal to comply with West Virginia rules and law, the Supreme Court of Appeals dismissed his appeal. For the reasons noted above, dismissal violated no constitutional right of petitioner.

Likewise, petitioner has failed to make a case for this Court reviewing the personal jurisdiction or punitive damage awards.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARVIN W. MASTERS
Counsel of Record

Of Counsel:
ANTHONY J. MAJESTRO
MASTERS & TAYLOR, L.C.
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Attorneys for Respondent

APPENDIX

Page

Motion to Stay Proceeding to Enforce Judgement in *Kessel vs. Leavitt, et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, December 15, 1995) .....App. 1

Excerpt of transcripts from Bond Hearing in *Kessel vs. Leavitt, et al., No. 92-C-2141* (Circuit Court of Cabell County, West Virginia, Dec. 22, 1995) App. 3

Excerpt from transcript of proceedings, Post-Trial Motions in *Kessel vs. Leavitt, et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, Dec. 22, 1995) .....App. 5

Ruling on Submitted Matter, *Kessel vs. Leavitt*, No. SS0006478 (Superior Court of California, County of Los Angeles, Aug. 9, 1996).....App. 8

Complaint to Set Aside Fraudulent Transfer and For Damages in *Kessel vs. Leavitt, et al.*, No. SC043857 (Superior Court for the State of California for the County of Los Angeles, Aug. 26, 1996).....App. 17

Objections to Defendant's Proposed Order and Request for Finding of Fact under CCP §§ 1710.40(c), 632, No. SS006478 (Superior Court for the State of California, For the County of Los Angeles, Nov. 7, 1996) .....App. 27

Plaintiffs/Appellees' Motion to Dismiss Appeal of Defendant Leavitt, No. 961098 (Before the Supreme Court of Appeals of West Virginia, Mar. 11, 1997).....App. 31

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
RAY MILLER KESSEL,

Plaintiffs,

Vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS CONATY, and
BRIAN P. CONATY,

Defendants.

MOTION TO STAY PROCEEDING
TO ENFORCE A JUDGMENT

Come now the defendants Rule 62(i), W.V.R.C.P., and the defendants move the Court to stay enforcement of the judgment against them for a period of 6 months so that the defendants may present a petition for appeal of said judgment to the West Virginia Supreme Court of Appeals.

DEFENDANTS,
By Counsel

/s/ George A. Stolze
GEORGE A. STOLZE
Attorney at Law
845 Fourth Avenue
Suite 300, Morris Building
Huntington, West Virginia 25701

IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL and
RAY MILLER KESSEL,

Plaintiffs,

Vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS CONATY, and
BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, George A. Stolze, of counsel for the Defendants, do hereby certify that I have served the foregoing Motion to Stay Proceeding to Enforce a Judgment upon the Plaintiffs by depositing a true copy thereof the United States mails, postage pre-paid, in an envelope addressed to Marvin W. Masters, Masters & Taylor, L.C., Fourth Floor Peoples Building, 179 Summers Street, Charleston, West Virginia 25301-2177, counsel of record for the Plaintiffs, this 15th day of December, 1995.

/s/ George A. Stolze
GEORGE A. STOLZE

[p. 2] IN THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL,
et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 92-C-2141

DAVID KEENE LEAVITT,
et al.,

Defendants.

BOND HEARING had in the above-styled action before the Honorable O. C. Spaulding, Judge, on Friday, the 22nd day of December, 1995.

APPEARANCES

MR. MARVIN MASTERS and ANTHONY J. MAJESTRO, Attorneys at Law, Charleston, West Virginia, Counsel for the Plaintiffs.

MR. GEORGE STOLZE, Attorney at Law, Huntington, West Virginia, Counsel for the Defendants.

Judith A. Greene,
Official Reporter

* * *

[p. 20] that, Your Honor. We simply don't want to freeze the income flow to Dr. and Mrs. Conaty, because they have to eat.

THE COURT: Developing such documents with those institutions that the Conatys can't come in and take a quick cash payout and head down the road.

MR. STOLZE: I'm sure there's some way to do that with these institutions, contractually.

THE COURT: I would think so. Now, let's talk about Mr. Leavitt. I do see Mr. Leavitt in a different category because he has no financial ties directly here to West Virginia.

MR. STOLZE: Well, obviously Mr. Leavitt is in a special category. On the other hand, though, Mr. Leavitt will not be able to post a bond in order to provide security in this state worth seven million dollars. That's a lot of money for any individual to come up with. We would not object to a two million dollar – to providing security in the amount of two million dollars plus interest.

MR. MAJESTRO: We don't have the financial statements that have been provided to the Court. Has Mr. Leavitt's statement?

MR. STOLZE: No. We don't have a financial

* * *

[p. 1] IN THE CIRCUIT COURT OF CABELL COUNTY
WEST VIRGINIA

JOHN WOODRUFF KESSEL and, RAY MILLER KESSEL, PLAINTIFFS, VS. DAVID KEENE LEAVITT, et al., DEFENDANTS.	CIVIL ACTION NO.: 92-C-2141

POST-TRIAL MOTIONS

Transcript of the proceedings had in the hearing of the above-styled action before the Honorable O. C. Spaulding, Judge, on Wednesday, the 27th day of December, 1995.

APPEARANCES:

MARVIN MASTERS, Esq., and ANTHONY MAJESTRO, Esq., Charleston, West Virginia, Counsel for the Plaintiffs.

GEORGE STOLZE, Esq., Huntington, West Virginia, Counsel for the Defendants.

JO ANN STEWART
CERTIFIED COURT REPORTER
750 FIFTH AVENUE, ROOM 215
HUNTINGTON, WEST VIRGINIA 25701

(304) 526-8605

JO ANN STEWART, CCR

* * *

[p. 107] a bond in this state anyway, because no surety company would write him one. Of course what happens is if the appeal is not granted or the appeal is lost, then the surety company has to pay the judgment or whatever the amount of the bond is, and then they seek to get the money back from Mr. Leavitt who doesn't have enough money to pay them presumably. So that is the only thing I can offer in Mr. Leavitt's behalf, and the Court can exercise his discretion in that regard.

THE COURT: Mr. Masters.

MR. MASTERS: Well, your Honor, we would request and move that the Court require full bond on the part of Mr. Leavitt. One of the things that is somewhat confusing to me is the last hearing George said that, as I understood what he said, was they were willing to post a $2,000,000 bond, that's my memory from Mr. Leavitt.

MR. STOLZE: No, I asked that bond be set in that matter. I said didn't say [sic] he was willing to post it or that he could post it.

MR. MASTERS: That was my understanding. That's the way I recall it.

MR. STOLZE: I don't believe he could post it.

MR. MASTERS: We do not believe that his assets are that limited. And we have no verification here today of

* * *

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: August 9, 1996

HONORABLE:	LORNA PARNELL	JUDGE
	M. BRYANT	DEPUTY SHERIFF
	G. TAPANES	DEPUTY CLERK
	C. SANDERS	ERM

SSOO6478

JOHN WOODRUFF KESSEL

vs.

DAVID KEENE LEAVITT

(Parties and counsel checked if present)

Counsel for Plaintiff:

Counsel for Defendant:

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER

The motion of defendant, David Keene Leavitt, to Vacate Judgment or in the alternative, for Stay of Enforcement of Judgment came on before the Court for hearing on 05-15-96. Based on the evidence presented and the applicable law, the Court now rules as follows.

Defendant David Keene Leavitt ("Leavitt") has filed a motion asking for this Court to either (1) vacate the judgment entered against defendant on the sister-state judgment entered in the Circuit Court of Cabell County, West Virginia in the case of John Woodruff Kessel and Ray Miller Kessel, plaintiffs v. David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty,

and Brian P. Conaty, Defendants, Civil Action No. 92-C-2141 (the "West Virginia action"), or, in the alternative, (2) stay enforcement of the judgment entered on the sister state judgment. Plaintiff, Dr. John Kessel, opposes the motion to vacate, but does not oppose the request for a stay of enforcement of the judgment provided that defendant Leavitt posts an undertaking sufficient to secure payment of the West Virginia judgment.

Following oral argument and extensive briefings, the matter was taken under submission by the Court.

The facts giving rise to the West Virginia action present a rather interesting and unique situation. Those facts, many of which are contested, need not be repeated in great detail here in light of this Court's determination as set forth herein. The procedural background is set forth briefly hereinbelow.

Defendant Leavitt is a resident of California. The other defendants in the West Virginia action are residents of West Virginia. Defendant Leavitt is alleged to have, inter alia, conspired with the other defendants, which conspiracy caused harm to plaintiff. When he was sued by plaintiff in the West Virginia action, defendant Leavitt moved for dismissal for lack of personal jurisdiction over him. Plaintiff opposed that motion, and the issue of personal jurisdiction was litigated in the West Virginia action. The West Virginia court denied defendant's motion to dismiss for lack of personal jurisdiction. Defendant thereafter filed an Answer to the Complaint in the West Virginia action wherein he asserted lack of personal jurisdiction as an affirmative defense. The matter went to trial, and a judgment of seven million dollars plus prejudgment

interest and costs was rendered against defendant Leavitt. The judgment of seven million dollars included five million dollars in punitive damages.

In post-judgment proceedings in the West Virginia action, enforcement of the judgment was stayed as to the West Virginia defendants based upon certain conditions which were satisfactory to the West Virginia court. As to a stay of the judgment with respect to defendant Leavitt, the West Virginia court held:

"It appearing to the Court that no evidence had been offered by said Defendant Leavitt of his financial condition, and although his counsel had made representations as to his approximate worth, no financial statement was provided and no offer was made by said defendant to provide security by bond or otherwise at the hearing on this date. The Court, after considering the evidence in this case and after considering the judgment and the situation of the parties, particularly that the defendant has no assets in the State of West Virginia, that he is not a resident of the State of West Virginia, that he has made no offer in any way to provide security of the judgment, it is ADJUDGED, ORDERED and DECREED that the stay of execution of the judgment in this matter be granted to said defendant DAVID KEENE LEAVITT upon posting with the Circuit Court of Cabell County good and sufficient bond in the amount of Seven Million Dollars to satisfy the Judgment, interest and costs in this proceeding."

No bond was posted by defendant Leavitt in West Virginia, and enforcement of the judgment has therefore not been stayed.

Plaintiff then had his sister state judgment entered here in California. Defendant has now filed his motion to vacate or to stay enforcement of the West Virginia judgment. Defendant contends, inter alia, that the West Virginia court did not have jurisdiction over him, that punitive damages were improperly awarded against him, and that other errors occurred at the trial which warrant reversal of the judgment. Plaintiff, naturally, disputes all of these contentions.

Defendant Leavitt (and the other defendants) have appealed the judgment in the West Virginia action to the West Virginia Supreme Court. On appeal, defendant Leavitt contends, inter alia, that the judgment against him should be vacated since the West Virginia court did not have jurisdiction over him. At the time that this matter was first argued before this Court, defendant Leavitt had filed a petition to appeal the West Virginia judgment, but it was not certain whether there would be any appellate review of the judgment in West Virginia action since, according to information provided to this Court, appellate review is a matter of discretion and not a matter of right in West Virginia in civil actions. However, during the time that this matter has been under submission, the West Virginia Supreme Court has accepted the appeal for review. According to information provided to this Court, the case will be fully considered on appeal and a written opinion will be issued by the West Virginia Supreme Court after additional briefing. All of this is likely to occur before May, 1997.

In light of the fact that the judgment in the West Virginia action, including the question of personal jurisdiction over defendant Leavitt by the West Virginia court, is

being fully reviewed by the West Virginia Supreme Court based upon a full record, this Court considers that the most appropriate action to be taken by it is to grant defendant Leavitt's request for a stay pending the review by the West Virginia Supreme Court.

This Court is authorized to stay enforcement on a judgment while an appeal is pending in a sister state "on such terms and conditions as are just." This may include the requirement that the defendant post an undertaking.

As noted earlier, enforcement of the judgment was ordered stayed by the West Virginia court if defendant Leavitt posted a bond in the amount of the judgment – seven million dollars. That court was familiar with all of the evidence in the case, the judgment, and the situation of the parties. For reasons which are not clear to this Court, defendant Leavitt did not provide evidence of his financial condition to the West Virginia court when the matter of the stay and the bond were being considered by that court (or at any other time that the matter was pending in that court).

At one point in the proceedings before the West Virginia court, counsel for defendant Leavitt represented to that court that, although defendant Leavitt could not post a bond in the amount of seven million dollars, defendant "would not object to providing security in the amount of two million dollars plus interest."

Since two million dollars is the amount of compensatory damages awarded to plaintiff against defendant Leavitt, the Court considers it appropriate to grant defendant Leavitt's request for a stay of enforcement of judgment on

condition that defendant Leavitt provide an undertaking in the amount of two million dollars.

Upon posting of the required undertaking with this Court, enforcement of the judgment in California against defendant Leavitt is stayed until proceedings on appeal in the West Virginia Supreme Court have been concluded, or until further order of this Court.

Dated: August 9, 1996

Lorna Parnell
Judge of the
Superior Court

A true and correct copy of this minute order is sent VIA U.S. Mail this date to the following:

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: ***(Aviso a Acusado)***

DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive

YOU ARE BEING SUED BY PLAINTIFF:
(A Ud. le está demandando)

JOHN WOODRUFF KESSEL

You have *30 CALENDAR DAYS* after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

Después de que le entreguen esta citación judicial usted tiene un plazo de 30 DIAS CALENDARIOS *para presentar una respuesta escrita a máquina en esta corte.*

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.

Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.

Existen otros requisitos legales. Puede que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

CASE NUMBER: *Nuniceor del Caso)*
SC043857

The name and address of the court is: *(El nombre y dirección de la corte es)*

SUPERIOR COURT OF CALIFORNIA
1725 Main Street
Santa Monica, California 90401
WEST DISTRICT

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: *(El nombre, la dirección y el numero de teléfono del abogado del demandante, o del demandante que no tiene abogado, es)*

DOBRIN & BRONNER
Brian L. Dobrin
Deborah P. Bronner
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 57[illegible]-1992

DATE: *(Fecha)* AUG 26 1996

Clerk, by /s/ Illegible, Deputy
(Actuario) D.R. Callicoatte *(Delegado)*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. [ ] as an individual defendant.
2. [ ] as the person sued under the fictitious name of *(specify)*:
3. [ ] on behalf of *(specify)*:

under: [ ] CCP 416.10 (corporation)
[ ] CCP 416.20 (defunct corporation)
[ ] CCP 416.40 (association or partnership)
[ ] CCP 416.60 (minor)
[ ] CCP 416.70 (conservatee)
[ ] CCP 416.90 (individual)
[ ] other:

4. [ ] by personal delivery on *(date)*:

DOBRIN & BRONNER
BRIAN L. DOBRIN, Esq. SBN: 159552
DEBORAH R. BRONNER SBN: 130306
1999 Avenue of the Stars, Suite 2800
Los Angeles, California 90067
(310) 572-1992

Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT, an individual, AILEEN LEAVITT, an individual, KERRY LEAVITT, aka KAREN LEAVITT, an individual, and DOES 1 through 10, inclusive. Defendants	Case No.: COMPLAINT TO SET ASIDE FRAUDULENT TRANSFER AND FOR DAMAGES [CC §3439.07]

Plaintiff alleges:

FIRST CAUSE OF ACTION

(To Set Aside Fraudulent Transfers
Against All Defendants)

1. Plaintiff is informed and believes that defendant David Leavitt and Aileen Leavitt are husband and wife

and Kerry Leavitt, aka Karen Leavitt, is defendant David Leavitt's and defendant Aileen Leavitt's daughter.

2. The true names and capacities, whether individual, corporate, associate or otherwise, of defendants named herein as DOES 1 through 10 inclusive, are unknown to plaintiff, who, therefore, sues such defendants by fictitious names. Plaintiff is informed and believes and thereupon alleges that each such DOE-defendant participated in, and is responsible for the acts and conduct alleged herein. Plaintiff is informed and believes and thereupon alleges that each defendant so referred to herein is responsible in some manner for the acts, omissions, occurrences, and damages alleged herein. Plaintiff will amend this Complaint to show such true names and capacities when they have been fully ascertained.

3. From and after December 7, 1995, plaintiff has been the holder of a certain claim against defendant David Keene Leavitt. This claim consists of a judgment rendered in the State of West Virginia in the amount of $6,966.687.47 attached hereto as EXHIBIT A. This judgment was entered in California on March 6, 1996 in the amount of $7,113,916.97, attached hereto as EXHIBIT B.

4. On March 12, 1996, defendant David Leavitt was served with a copy of an Application for Entry of Judgment On Sister State Judgment and Notice of Entry of Judgment on Sister State Judgment. On or about April 12, 1996, defendant David Leavitt brought a motion to vacate the California judgement. On August 9, 1996, Honorable Judge Lorna Parnell denied defendant's motion to vacate the judgment and ordered that enforcement against

defendant David Leavitt be stayed only if defendant David Leavitt posted a bond in the amount of $2,000,000. To date, defendant David Leavitt has not posted any bond and no part of the judgment has been satisfied.

5. Up until April and May of 1996, defendant David Leavitt was the owner, or part owner, of various parcels of real property in Los Angeles and San Bernardino counties. As set forth below, these properties were transferred and/or transmuted to avoid, hinder or defraud plaintiff's attempt to enforce the judgment as aforesaid.

6. Plaintiff is informed and believes that the following property was held as defendant David Leavitt's separate property until on or about April 1, 1996 and is described as follows:

A) 2160 Century Park East, Unit 502 North, Los Angeles, California and also described as Lot 1 of Tract No. 31411, as per Map recorded in Book 830 pages 84 and 85 Book of Maps;

B) 148 Crescent Drive, Beverly Hills, California and also known as Lot 1 of Tract No. 36401 as per Map recorded in Book 935 pages 82 and 83 Book of Maps.

Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendant David Leavitt recorded a transfer of the above described properties via quitclaim deeds, copies of which are attached hereto as EXHIBITS C and D. Defendant David Leavitt transferred the properties described in this paragraph by quitclaim deed to defendant Aileen Leavitt. On June 7, 1996, defendant Aileen Leavitt recorded a deed of trust reflecting that she had obtained a loan in the amount of $165,000.00

secured by the property located at and described above as 148 Crescent Drive, Beverly Hills, California. A copy of the deed of trust is attached hereto as EXHIBIT I.

7. Plaintiff is informed and believes that the following property was owned by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

C) 237 Almont Drive, Beverly Hills California and also described as Lots 265 and 266 of Tract No. 7005 as per Map recorded in Book 72, page 28 of Maps. On or about May 13, 1996, the defendants' interest in this property was transmuted to the undivided sole and separate property of defendants David Leavitt and Aileen Leavitt via quitclaim deed, a copy of which is attached hereto as Exhibit E.

8. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as tenants in common until on or about April 1, 1996:

D) 2170 Century Park East, #1203, Los Angeles, California and also described as an undivided .1608 interest in Lot 1 of Tract No. 31411 as per map recorded in Book 830, pages 84 and 85 of Book of Maps. Plaintiff is informed and believes and thereon alleges that on or about April 2, 1996, defendants David Leavitt and Aileen Leavitt transferred by quitclaim deed the property described in this paragraph to defendant Kerry Leavitt without consideration. A copy of said quitclaim deed is attached hereto as EXHIBIT F.

9. Plaintiff is informed and believes that the following property was held in part by defendants David Leavitt and Aileen Leavitt as community property until on or about December 21, 1995:

E) 8327 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps;

F) 8329 Ridpath Drive, Los Angeles, California, and also described as Lot 15 in Block 63 of Tract 2042 as per Map recorded in Book 21, page 156 of Maps.

Plaintiff is informed and believes that defendants David Leavitt and Aileen Leavitt conspired by recording a document entitled Agreement Converting Community Property to Tenancy in Common with the Recorder's Office in Los Angeles County, two weeks after the rendering of the West Virginia judgment, described in Paragraph 3 above, to fraudulently transmute the property identified in this paragraph (9) from community property to the separate property of said defendants. A copy of the said Agreement Converting Community Property to Tenancy in Common is attached hereto as EXHIBIT G.

10. Plaintiff is informed and believes that the following property was held by defendants David Leavitt and Aileen Leavitt as community property until on or about May 12, 1996:

G) Unit 51, Edgewater Shores Condominiums, 184 South Highway 73, Lake Arrowhead, County of San Bernardino, California, also described as Lot 51, Tract 8650 as per Map recorded in Book 117, pages 97-100. This property was transmuted via quitclaim deed on or about

May 13, 1996 into the separate property of defendants David Leavitt and Aileen Leavitt. A copy of the quitclaim deed is attached hereto as EXHIBIT H.

11. Plaintiff is informed and believes and hereon alleges that the aforementioned transfers and tranmutations were made with the actual intent to hinder, delay or defraud creditors, including plaintiff in the collecion of his judgment.

12. The aforementioned transfers were all conveyed as gifts to "insiders" and defendant David Leavitt did not receive reasonably equivalent value in exchange or the property. The aforementioned transfers occurred hortly after defendant David Leavitt was served with Notice of Application for Entry of Sister State Judgment onMarch 12, 1996, or in the case of the Ridpath properties, described in paragraph 9 above, the aforesaid tranmutations were made shortly after a judgment was entered against defendant David Leavitt in West Virginia

13. Plaintiff is informed and believes and hereon alleges that the above-described property was received by defendants Aileen Leavitt and Kerry Leavitt with the knowledge that defendant David Leavitt intendedto hinder, delay, or defraud the collection of plaintiff's aforementioned judgment.

SECOND CAUSE OF ACTION

(Conspiracy Against all Named Defendants

14. Plaintiff refers to and incorporates herein by reference paragraphs 1 though 13 inclusive.

15. As alleged above, defendants knowingly and willfully conspired between themselves to hinder, delay, and defraud plaintiff in the collection of his judgment against defendant David Leavitt.

16. Under this conspiracy, the above-named defendants agreed defendants Aileen, and Kerry Leavitt with respect to 2170 Century Park East, Unit 1203, would take as gifts and without consideration, as their sole and separate property, the aforementioned properties so that plaintiff could not satisfy the judgment awarded against David Leavitt.

17. Also under this conspiracy, defendants David Leavitt and Aileen Leavitt knowingly and willfully transmuted property from community property to separate property to effectively cut plaintiff off from the ability to satisfy his judgment as to half the property that was transferred to defendant Aileen Leavitt.

18. Further, defendant Aileen Leavitt, on June 7, 1996, obtained a loan in the amount of $165,000.00 secured by a Deed of Trust against the property located at and described above as 148 Crescent Drive, Beverly Hills, California. By doing so, Aileen Leavitt knowingly and willfully reduced the value of the property that was previously fraudulently conveyed by defendant David Leavitt and in violation of an agreement reached in open court on May 15, 1996, in the presence of defendants David Leavitt and Aileen Leavitt, wherein defendant David Leavitt, through counsel, agreed not to transfer or secret assets prior to the court's ruling on defendant's Motion to Vacate Judgment. A copy of the Deed of Trust is attached hereto as EXHIBIT I.

19. Defendants Aileen Leavitt, Kerry Leavitt and David Leavitt did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

20. As a proximate result of the wrongful acts alleged herein, plaintiff has been generally damaged in the sum of $2,000,000.00.

21. At all times mentioned herein, defendants Aileen Leavitt and Kerry Leavitt knew of plaintiff's claim against David Leavitt and knew that the claim could be satisfied by the aforementioned real property. Notwithstanding this knowledge, defendants Aileen Leavitt and Kerry Leavitt intentionally, willfully, and maliciously did the things herein alleged to defraud and oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages according to proof.

Wherefore, plaintiff prays judgment as follows:

On the First Cause of Action:

1. That the transfers from defendant David Leavitt to defendants Aileen Leavitt and Kerry Leavitt be set aside and declared void as to the plaintiff herein to the extent necessary to satisfy plaintiff judgment in the sum of $7,113,916.97 plus interest thereon at the rate of 10% per annum from March 6, 1996;

2. That an order pendente lite be granted plaintiff enjoining and restraining defendants Aileen Leavitt and Kerry aka Karen Leavitt and her representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning or otherwise disposing of any of the property transferred;

3. That the judgment herein be declared a lien on the property transferred;

4. That an order be made declaring that defendant holds the same interest he held in each of the properties prior to the wrongful transfers as aforesaid;

5. That defendants Aileen Leavitt and Kerry Leavitt, aka Karen Leavitt, be required to account to plaintiff for all profits and proceeds earned from or taken in exchange for the property described above;

On the Second Cause of Action against defendants, and each of them, as follows:

6. For general damages in the amount of $2,000,000.00;

7. For special damages in the among [sic] according to proof;

8. For punitive damages in an amount according to proof; On all causes of action:

9. For costs of suit herein incurred;

10. For attorneys' fees; and

11. For such other and further relief as the court may deem proper.

Dated: August 22, 1996

LAW OFFICES OF DOBRIN
& BRONNER

By: /s/ Brian L. Dobrin
Brian L. Dobrin
Attorneys for Plaintiff
John Woodruff Kessel

DOBRIN & BRONNER
BRIAN L. DOBRIN, Esq. SBN: 159552
DEBORAH R. BRONNER SBN: 130306
1999 Avenue of the Stars, Suite 2800
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(310) 572-1992

Attorneys for Plaintiff
JOHN WOODRUFF KESSEL

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff, vs. DAVID KEENE LEAVITT Defendant.	Case No.: SS 006478 OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 [CRC §391]

TO THE ABOVE-ENTITLED COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff JOHN WOODRUFF KESSEL hereby objects to defendant's proposed order submitted on or about November 5, 1996, on the grounds that it does not accurately reflect the Court's ruling of November 4, 1996 on defendant's Motion to Vacate Judgment or in the Alternative for Stay of Enforcement.

On November 4, 1996, the Court ruled as follows:

1. California does not have to afford the West Virginia Sister State judgment full faith and credit under the United States Constitution because the West Virginia judgment is not res judicata under the laws of West Virginia because it is pending appeal in West Virginia;

2. The issue of whether the Circuit Court of Cabell County had personal jurisdiction over defendant DAVID KEENE LEAVITT may be reexamined by this Court because the Sister State Judgment is not res judicata in West Virginia;

3. The Circuit Court of Cabell County West Virginia did not have personal jurisdiction over defendant DAVID KEENE LEAVITT;

4. The above rulings are made without prejudice to plaintiff JOHN WOODRUFF KESSEL's right to re-enter the Sister State West Virginia judgment in California upon that judgment having res judicata effect as defined by West Virginia law.

FURTHER, this Court heard defendant's motion *de novo* and, accordingly, it is improper to rule on the motion as if it were a "Motion to Reconsider."

FURTHER, plaintiff JOHN WOODRUFF KESSEL request [sic] this Court under CCP §§1710.40(c) and 632 to issue a finding of fact and law regarding the disputed nature of defendant DAVID KEENE LEAVITT's contacts with West Virginia;

FURTHER, plaintiff JOHN WOODRUFF KESSEL objects to name and address of defendant DAVID KEENE

LEAVITT's law firm printed on the order, which is a violation of L.A.Sup.Ct. Rule 3.0(1).

Dated:
November 6, 1996

LAW OFFICES OF DOBRIN & BRONNER

By /s/ Brian L. Dobrin
BRIAN L. DOBRIN
Attorneys for Plaintiff,
John Woodruff Kessel

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 2800, Los Angeles, California, 90067.

On November 7, 1996, I caused the attached document(s) described as OBJECTIONS TO DEFENDANT'S PROPOSED ORDER AND REQUEST FOR FINDING OF FACT UNDER CCP §§1710.40(c), 632 on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Robert M. Turner, Esq.
Larry R. Feldman, Esq.
Fogel, Feldman, Ostrov, Ringler & Klevins
1620 26th Street, Suite 100 South
Santa Monica, California 90404-4040

(X) (BY MAIL) I caused such envelopes with postage thereon fully prepaid to be placed in the United States Mail at Los Angeles, California. I am an active member of the State Bar of California. I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice such correspondence would be deposited with the U.S. Postal Service on the same day with the postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

( ) (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the residence of the addresses.

( ) (BY MESSENGER) By entrusting such envelope to a professional messenger service to effect personal service and delivery.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

( ) (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 7, 1996, at Los Angeles, California.

/s/ Brian L. Dobrin
Brian L. Dobrin

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

PLAINTIFFS/APPELLEES' MOTION TO DISMISS APPEAL OF DEFENDANT LEAVITT

(Filed Mar. 11, 1997)

TO THE HONORABLE JUSTICES OF THE WEST VIRGINIA SUPREME COURT OF APPEALS:

Now come plaintiffs/appellees in the underlying civil action and move the Court to dismiss the appeal of defendant/appellant David Keene Leavitt pursuant to previous order of this Honorable Court entered on February 6, 1997, for the following reasons:

1. Defendant/appellant Leavitt has failed and refused to post bond pursuant to this Court's order of February 6, 1997.

2. Defendant/appellant has never filed with the Circuit Court of Cabell County, West Virginia, or this

Honorable Court any motion or pleading requesting any alternative bond or means of providing security for the judgment granted by the Circuit Court of Cabell County, West Virginia, on December 7, 1995, and which is the subject of this appeal, nor has defendant filed verified documentation of his assets in this Court.

3. Since the briefing and argument concerning the plaintiff/appellee's motion to require reasonable bond and security as a condition to prosecuting the appeal, the California Court has granted defendant Leavitt's demurrer to plaintiff's fraudulent conveyance action (based upon the prior ruling of the California Court vacating plaintiff's judgment allegedly for lack of personal jurisdiction).

4. Further, defendant argued to this Court that plaintiff has security for the judgment in California because plaintiff has filed lis pendens against defendant's property. However, the lis pendens which were based upon the fraudulent transfer action are now in jeopardy and plaintiff has been threatened with a lawsuit in California if he attempts to protect the liens by filing a writ to the California Appellate Court. (See attached letter dated February 26, 1997, from Boyd Lemon, attorney for Leavitt, to Brian Dobrin, attorney for plaintiff, John Kessel.)

Therefore, the defendant having made no offer of security whatsoever, and having posted no bond whatsoever, plaintiff respectfully moves this Honorable Court to dismiss the appeal of David Keene Leavitt for failure to comply with this Court's order dated February 6, 1997.

Respectfully submitted,

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL

By Counsel

/s/ Marvin W. Masters
Marvin W. Masters
Paula L. Wilson
Masters & Taylor, L.C.
181 Summers Street
Charleston, West Virginia 25301
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BOYD S. LEMON
C. KELLY McCOURT
ERIC C. BRONSON

CENTRAL CALIFORNIA OFFICE
1111 RIVERSIDE AVENUE,
SUITE 504
ILLEGIBLE, CALIFORNIA [ILLEGIBLE]
TELEPHONE (805) [ILLEGIBLE]
FACSIMILE (805) [ILLEGIBLE]

February 26, 1997

VIA FACSIMILE AND U.S. MAIL

Brian L. Dobrin, Esq.
Dobrin & Bronner
1999 Avenue of the Stars
Suite 2800
Los Angeles, CA 90067-6082

Re: Kessel v. Leavitt

Dear Mr. Dobrin:

I have received your letter of February 26, 1997 regarding *Code of Civil Procedure* Sections 405.35 and 405.39. Although you correctly described some of the provisions in those sections regarding the effectiveness of an order expunging notices of pending action, a Petition for Writ of Mandate in this case would be totally frivolous and in bad faith. As you know, in order to avoid expungement you had the burden of proof to show a likelihood of success on the merits of the fraudulent conveyance action. The Court ordered the fraudulent conveyance action dismissed. Therefore, there is no longer any basis for the existence of a lis pendens unless and until the Court's order of dismissal is reversed on appeal. In other words, once the Court decided to dismiss the fraudulent conveyance action, it was required to expunge the lis pendens.

Your client and his counsel are already liable to the Leavitts for damages caused by wrongful lis pendens, including, but not limited to, loss of rental income due to an inability to repair serious rain and wind damage to one of their buildings and severe emotional distress suffered by the Leavitts as a result of having virtually all of

their assets unavailable to them. You now have the opportunity to stop those damages from continuing. If, however, you file a Petition for Writ of Mandate and cause the lis pendens to continue in effect, the damage to the Leavitts caused by the wrongful lis pendens will continue to occur and will increase.

Please take notice that if you file a Petition for writ of Mandate, which would be a frivolous bad faith attempt to continue to tie up the Leavitts' property, the Leavitts will file an action against your client and his counsel for malicious prosecution and all other appropriate causes of action, and the damages will be very substantial.

I suggest that you do appropriate legal research and also consult with independent counsel to advise you. You and independent counsel should be able to conclude that a Petition for Writ of Mandate would be totally without merit, because the action in which it was filed has been dismissed. You can pursue an appeal of the order of dismissal, but you have no right to a Writ of Mandate to vacate the expungement of the lis pendens, when the action in which it was filed has been dismissed, and therefore there can be no likelihood of success on the merits, unless and until there is a reversal on appeal.

I hope that you realize the seriousness of this matter, both to yourself and your client and do not take the filing of a Petition for Writ of Mandate lightly. You can be

assured that my clients will prosecute appropriate actions against your client and his counsel to their conclusion.

Very truly yours,

/s/ Boyd S. Lemon

BSL/bjr

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

NO. 961098

JOHN WOODRUFF KESSEL, and
RAY MILLER KESSEL,

Plaintiffs,

v.

DAVID KEENE LEAVITT,
ANNE GILMORE CONATY,
ELEANOR WOLFE CONATY,
THOMAS J. CONATY, and
BRIAN P. CONATY,

Defendants.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for plaintiffs, do hereby certify that a true and exact copy of the foregoing "Plaintiffs/Appellees' Motion to Dismiss appeal of Defendant Leavitt" was served upon:

Lonnie C. Simmons
DiTrapano & Jackson
604 Virginia Street, East
Charleston, West Virginia 25301

by hand delivering same this 11th day of March, 1997.

/s/ Marvin W. Masters
Marvin W. Masters